

**A Affin Bank Bhd (formerly known as BSN Commercial Bank
(M) Bhd) v HIB-C Industries Sdn Bhd & Ors**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02-1717
OF 2010
ABU SAMAH, CLEMENT SKINNER AND AZIAH ALI JJCA
15 JANUARY 2013

C *Civil Procedure — Service — Letter of demand — Claim for repayment of
overdraft facility — Issuance of letter of demands to four witnesses but only two
testified — Other two witnesses claiming non-receivance of any notice of demand
under guarantee — Whether sufficient to prove that notice or demand properly
D addressed notwithstanding they were returned undelivered*

Affin Bank Bhd had granted banking facilities to HIB-C Industries Sdn Bhd
(‘the borrower’) in the sum of RM980,000 which consisted of an overdraft
facility of RM500,000 and a term loan of RM480,000. The facility agreement
E was guaranteed by the second, third and fourth respondents (‘the guarantors’)
who were directors of the borrower company. The guarantors agreed to pay all
moneys owing or remaining unpaid from the borrower, jointly and severally,
upon demand. When the borrower defaulted in repayment of the principal
sum, the appellant filed an action against the borrower and the guarantors.
F Subsequently, judgment in default was entered against the borrower and the
fourth respondent. The appellant’s present appeal was confined to the second
and third respondents only although the notice of appeal named all the
defendants in the court below as respondents. The second and third
respondents argued that they did not receive any notice of demand under the
G guarantee. Although, the appellant called four witnesses, the second and third
respondents did not testify. The respondents did not make a submission to
answer and consequently, the appellant’s claim was dismissed with costs on the
ground that the notice of demand was not served on the second and third
H respondents in accordance with cl 12 of the letter of guarantee. The learned
trial judge held that the notice of demand was not served on the second and
third respondents on the ground that the appellant’s Vice President of Special
Asset Management (‘PW4’) in charge of recovery of loans conceded in
cross-examination that the recipient of the notice of demand was Customax
Sdn Bhd and that based on the AR cards the respondents did not receive the
I notice of demand.

Held, allowing the appeal with costs:

- (1) Clause 12 of the letter of guarantee was crystal clear and devoid of any ambiguity. The onus on the appellant was merely to show that the notice

of demand to the second and third respondents was sent by post addressed to them at their addresses as stated in the letter of guarantee or at the their last known place of business or abode. The demand or notice so sent would be deemed to be served on the day following that on which it is posted. In proving such service it would be sufficient to prove that the notice or demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by postal authorities (see para 10).

- (2) It was an undisputed fact that the notice of demand was sent to the second and third respondents according to their addresses as specified in the letter of guarantee. It was immaterial whether such notice or demand was actually delivered or not. The fact that the AR cards were signed by an unknown person and bore the rubber stamp of Customax Sdn Bhd was irrelevant to the appellant's claim based on the letter of guarantee. The admission by PW4 that the AR cards showed that the notice of demand was received by Customax Sdn Bhd and not by the second and third respondents had no bearing on the proper construction of cl 12 of the letter of guarantee and could not form the basis of dismissing the appellant's claim against the second and third respondents (see para 11).

[Bahasa Malaysia summary]

Affin Bank Bhd telah memberikan kemudahan perbankan kepada HIB-C Industries Sdn Bhd ('peminjam') dalam wang sejumlah RM980,000 yang mana mengandungi kemudahan overdraf sebanyak RM500,000 dan pinjaman berjangka RM480,000. Perjanjian kemudahan dijamin oleh responden-responden kedua, ketiga dan keempat ('penjamin') yang mana adalah pengarah syarikat peminjam. Penjamin-penjamin bersetuju untuk membayar kesemua wang yang dipinjam atau yang masih belum dibayar daripada peminjam, bersama-sama dan berasingan, atas tuntutan. Apabila peminjam mengingkari bayaran balik jumlah pokok, perayu memfailkan tindakan terhadap peminjam dan penjamin-penjamin. Kemudiannya, penghakiman ingkar dimasukkan terhadap peminjam dan responden keempat. Rayuan perayu ini melingkungi hanya kepada responden-responden kedua dan ketiga walaupun notis rayuan menamakan kesemua defendan di Mahkamah Tinggi sebagai responden-responden. Responden-responden kedua dan ketiga berhujah bahawa mereka tidak menerima apa-apa notis tuntutan di bawah jaminan tersebut. Walaupun perayu memanggil empat saksi, responden-responden kedua dan ketiga tidak memberi keterangan. Responden-responden tidak membuat hujahan untuk menjawab dan akhirnya, tuntutan perayu ditolak dengan kos atas alasan bahawa notis tuntutan tidak diserahkan kepada responden-responden kedua dan ketiga mengikut klausa 12 surat jaminan tersebut. Hakim perbicaraan yang bijaksana memutuskan bahawa notis tuntutan tidak diserahkan ke atas responden-responden kedua dan ketiga atas alasan bahawa Timbalan Presiden

- A Pengurusan Aset Khas perayu ('PW4') bertanggungjawab untuk mendapatkan balik pinjaman-pinjaman mengakui dalam pemeriksaan balas bahawa penerima notis tuntutan adalah Customax Sdn Bhd dan berdasarkan kad-kad AR, responden-responden tidak menerima notis tuntutan tersebut.
- B **Diputuskan**, membenarkan rayuan dengan kos:
- (1) Klausa 12 surat jaminan adalah jelas dan tidak mempunyai apa-apa keaburan. Beban ke atas perayu adalah semata-mata untuk menunjukkan bahawa notis tuntutan kepada responden-responden kedua dan ketiga dihantar melalui pos dialamatkan kepada mereka ke alamat mereka seperti yang dinyatakan di dalam surat jaminan atau di tempat terakhir perniagaan atau tempat tinggal mereka yang diketahui. Tuntutan atau notis yang dihantar akan dianggap diserahkan pada hari berikutnya selepas sehari diposkan. Dalam membuktikan penyerahan sedemikian adalah mencukupi untuk membuktikan bahawa notis atau tuntutan dialamatkan dengan betul dan diletakkan di dalam pos tanpa mengambil kira yang notis atau tuntutan tersebut mungkin akhirnya dikembalikan tidak diserahkan oleh pihak berkuasa pos (lihat perenggan 10).
- (2) Adalah fakta yang tidak dipertikaikan bahawa yang notis tuntutan tersebut dihantar kepada responden-responden kedua dan ketiga mengikut alamat-alamat mereka seperti yang dinyatakan di dalam surat jaminan. Ia tidak material sama ada notis atau tuntutan sedemikian sebenarnya dihantar atau tidak. Fakta bahawa kad-kad AR ditandatangani oleh orang yang tidak dikenali dan mempunyai cap getah Customax Sdn Bhd tidak relevan kepada tuntutan perayu berdasarkan surat jaminan. Pengakuan oleh PW4 bahawa kad-kad AR menunjukkan bahawa notis tuntutan diterima oleh Customax Sdn Bhd dan bukan oleh responden-responden kedua dan ketiga tidak mempunyai kesan ke atas tafsiran betul klausa 12 surat jaminan tersebut dan tidak dapat membentuk asas untuk menolak tuntutan perayu terhadap responden-responden kedua dan ketiga (lihat perenggan 11).]

Notes

- H For cases on letter of demand, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7393–7394.

Cases referred to

- Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413; [1994] 2 CLJ 1, SC (refd)
- Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610, SC (fold)

Appeal from: Civil Suit No 22–488 of 1997 (High Court, Shah Alam)

*P Mithran (Dass, Jainab & Associates) for the appellant.
Mandave Singh Gill (KS Dass & Gana) for the second respondent.
Amarjeet Singh (Zubeda & Amarjeet) for the third respondent.*

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Abu Samah JCA (delivering judgment of the court):

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[1] The only issue in this appeal is on the proper construction of cl 12 of the letter of guarantee dated 6 April 1996 (exh P3) executed by the second and third respondents in favour of the appellant.

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[2] By a facility agreement dated 7 June 1996 Affin Bank Bhd (previously known as BSN Commercial Bank (M) Bhd) granted banking facilities to HIB-C Industries Sdn Bhd ('the borrower') totalling RM980,000 consisting of an overdraft facility of RM500,000 and a term loan of RM480,000.

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[3] The second, third and fourth respondents, being directors of the borrower company (the first defendant in the High Court) stood as guarantors to the said banking facilities and agreed to pay all moneys owing or remaining unpaid from the borrower, jointly and severally, upon demand. Clause 5 of the letter of guarantee states that this guarantee is a continuing guarantee and is limited to RM980,000 only.

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[4] Upon the borrower's default in repayment of the principal sum and the interests due thereon, the appellant sued the borrower and all the three guarantors. Judgment in default was entered against the borrower and the fourth respondent on 29 May 1999. The appellant's appeal before us is confined to the second and third respondents only although the notice of appeal named all the defendants in the court below, as respondents.

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[5] The second and third respondents, in their separate statement of defence, inter alia, pleaded that they did not receive any notice of demand under the guarantee and put the appellant to strict proof thereof.

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[6] At the trial, the appellant called four witnesses. The second and third respondents did not testify. Learned counsel for the respondents elected to make a submission of no case to answer.

[7] The learned trial judge dismissed the appellant's claim with costs on the ground that the notice of demand was not served on the second and third respondents in accordance with cl 12 of the letter of guarantee.

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[8] Clause 12 of the letter of guarantee provides:

A 12. Any demand for payment or any other demand or notice under this Guarantee
may be made by any of your manager, sub-manager, secretary or other officers for
the time being appointed by you or by any person or firm for the time being acting
as your solicitor or solicitors by letter sent by post addressed to me/us or each of us
at my/our address specified herein or at my/our last known place of business or
B abode and a demand or notice so sent shall be deemed to be served on the day
following that on which it is posted. In proving such service it shall be sufficient to
prove that the notice or demand was properly addressed and put in the post
notwithstanding that the said notice or demand may subsequently be returned
undelivered by the postal authorities.

C [9] The learned trial judge held the view that the notice of demand was not
served on the second and third respondents on the ground that the appellant's
Vice President of Special Asset Management ('PW4') in charge of recovery of
loans conceded in cross examination that the recipient of the notice of demand
D was Customax Sdn Bhd and that based on the AR Cards the respondents did
not receive the notice of demand. The learned trial judge found that the
signature which appeared on the AR Cards bore the rubber stamp of Customax
Sdn Bhd. The learned judge relied on *Mok Hin Wah & Ors v United Malayan
Banking Corp Bhd* [1987] 2 MLJ 610 cited by the respondents rather than
E *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413; [1994] 2
CLJ 1, cited by the appellant. This is what the learned judge said:

F In *Mok Hin Wah's* case, the guarantors received carbon copies of the demand and yet
the Supreme Court held that demand were not sufficient. In the instant case, it was
very clear that someone else receive the letters of demand. It is my view there was no
real and proper demand made by the plaintiff against the second and third
defendants.

G [10] In our judgment, cl 12 of the letter of guarantee is crystal clear and
devoid of any ambiguity. The onus on the appellant is merely to show that the
notice of demand to the second and third respondents was sent by post
addressed to them at their addresses as stated in the letter of guarantee or at the
their last known place of business or abode. The demand or notice so sent shall
be deemed to be served on the day following that on which it is posted. In
H proving such service it shall be sufficient to prove that the notice or demand was
properly addressed and put in the post *notwithstanding that the said notice or
demand may subsequently be returned undelivered by postal authorities.*
(Emphasis added.)

I [11] It is an undisputed fact that the notice of demand (exh P13) was sent to
the second and third respondents according to their addresses as specified in the
letter of guarantee. The AR Cards were exhibited as P13A. The reference
number of the notice of demand is written on the AR Cards. It is immaterial
whether such notice or demand was actually delivered or not. The fact that the

AR Cards were signed by an unknown person and bore the rubber stamp of Customax Sdn Bhd is irrelevant to the appellant's claim based on the letter of guarantee in view of cl 12 of the letter of guarantee. The admission by PW4 that the AR Cards showed that the notice of demand was received by Customax Sdn Bhd and not by the second and third respondents has no bearing on the proper construction of cl 12 of the letter of guarantee and cannot form the basis of dismissing the appellant's claim against the second and third respondents.

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[12] The true meaning of a common deeming clause in a letter of guarantee had been authoritatively explained in *Amanah Merchant Bank Bhd's* case. In that case the appellant's solicitor sent the notice of demand pursuant to cl 17 of the letter of guarantee to the respondent at his last known address. Clause 17 of the letter of guarantee states:

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17. Any notice may be served on the undersigned or his/their executors administrators or legal representatives either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it is posted.

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[13] The AR Card had not been returned. The respondent denied receiving it. The trial judge dismissed the claim on the ground that the burden was on the appellant to prove that the said notice had been sent to and received by the respondent. On appeal by the appellant, the Supreme Court (as it then was) reversed the said decision and allowed the appellant's claim against the respondent. Mohamed Dzaiddin bin Hj Abdullah SCJ, in delivering the judgment of the Supreme Court said:

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For reasons stated above, in our judgment, on the true construction of cl 17 of the guarantee, the notice of demand sent by AR registered post and acknowledged receipt for service by the postal authority on 9 March 1988 was effectively served on the respondent on the following day, despite the non-return of the retour card by virtue of the deeming provision therein. In the result, the appellant had established a cause of action against the respondent. Accordingly, we allow this appeal, and with the consent of the parties, we make no order as to costs. The deposit will, however, be refunded to the appellant.

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[14] The case against the second and third respondents herein is even stronger. Clause 12 of the letter of guarantee expressly states that in proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by the postal authorities. There is no such corresponding provision in cl 17 of the guarantee in *Amanah*

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A *Merchant Bank Bhd.*

CROSS-APPEAL

B [15] The purpose of the cross-appeals by the second and third respondents is merely to support the decision of the trial judge, by advancing additional grounds as to why the said decision must be affirmed. In our judgment the cross-appeals are without any merit.

C [16] For the aforesaid reasons we allowed the appellant's appeal with costs here and below and ordered that judgment be entered against the second and third respondents as pleaded and that the cross-appeals be dismissed with costs.

Appeal allowed with costs.

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Reported by Afiq Mohamad Noor

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